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In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT MICHAEL HANAHAN, PETITIONER

v.

DENNIS M. LUTHER, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that an incorrect standard was used by the district court in reviewing the sufficiency of the evidence relied upon by the United States Parole Commission in revoking his parole.

After a hearing before the Parole Commission, petitioner—who was on parole from sentences for federal bank robbery and robbery of an Internal Revenue facility—was found to have violated four conditions of his parole. His parole was revoked, with credit for time served on parole and with eligibility for resumption of parole after two years' custody. The Commission's National Board of Appeals affirmed the revocation, finding that petitioner had violated his parole by his unauthorized association with known criminals and his unauthorized possession of firearms. His petition pursuant to 28 U.S.C. 2241 for a writ of habeas corpus was denied by the United States District Court for the Northern

District of Illinois (Pet. App. 13a-18a). The court of appeals affirmed (Pet. App. 1a-12a).

1. The parole violator warrant against petitioner was issued as the result of his arrest on December 3, 1979, by local police after he met with three other parolees—Paul W. Panczko, Robert Pullia and Gerald Tomaszek—and a fourth person, Robert Siegal. The police began a surveillance of a Cadillac driven by Panczko, in which Pullia and Siegal were passengers, at 3:00 P.M. An hour later the vehicle was parked in a bank parking lot. Two and a half hours later, a van driven by petitioner and a Chevrolet driven by Tomaszek parked next to the Cadillac (C.A. App. Gov't Exh. R 25). Everyone got out of the cars; Panczko then removed a brown paper bag, from which a five foot crowbar protruded, from the trunk of Tomaszek's Chevrolet and placed it inside petitioner's van (*id.* at 35-36). After a short conversation, the men returned to their cars and started to drive off (*id.* at 36-37). The officers attempted to stop them in order to interview them. Tomaszek sideswiped one officer's vehicle and took off at high speed in one direction, while petitioner took off at high speed in another direction. After making a number of erratic turns and going through a chainlink fence surrounding a high school through a chainlink fence surrounding a high school football field, petitioner was apprehended. A search of his vehicle disclosed that the brown paper bag contained two loaded pistols, plastic face masks, a pry bar and a sledge hammer; a third loaded pistol was found on the floor of the van (*id.* at 26).

The Parole Commission's Board of Appeals found that the testimony of the police officers concerning the circumstances of petitioner's arrest sustained the charge of unauthorized association with known criminals. It added that the charge was also sustained by petitioner's testimony in state court that he attempted to elude arrest because he did not want to be caught associating with other criminals and

knew that at least Tomaszek was a federal parolee. In respect to the charge of unauthorized possession of firearms, the Board of Appeals inferred from the testimony concerning the "desperate and immediate reaction" of petitioner and his companions when approached by the police that "a conspiracy was in progress to engage in an unlawful activity of an unknown nature involving the use of firearms and certain tools." It therefore found it to be "more likely than not" that, regardless of whether petitioner saw the two firearms being transferred to his van, he knew of their planned transfer and also knew of the third loaded firearm that was already in the van (C.A. App. Gov't Exh. Q 2).

2. The Parole Commission made the findings upon which it revoked petitioner's parole upon the basis of a preponderance of the evidence standard, as required by 18 U.S.C. 4214(d). Petitioner, invoking *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (1966), and *Jackson* v. *Virginia*, 443 U.S. 307 (1979), contends that it was necessary for the district court, in reviewing the Commission's decision on his petition for a writ of habeas corpus, to determine independently whether the decision was supported by a preponderance of the evidence. The cited cases do not sustain his contention. *Woodby* held that the Immigration and Naturalization Service cannot order deportation unless it finds the necessary grounds by "clear, unequivocal and convincing evidence" (385 U.S. at 286). It emphasized, however, that the standard to be imposed on judicial review is whether the order is supported by "reasonable, substantial and probative evidence" (*id.* at 282-284). Similarly, *Jackson* held that an appellate court, in reviewing a criminal conviction, need not determine whether "*it* believes that the evidence at the trial established guilt beyond a reasonable doubt," but rather whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond

a reasonable doubt." 443 U.S. at 319 (emphasis in original). Both *Wooby* and *Jackson*, in short, enunciate essentially the same "rational basis" test for judicial review that the district court applied in this case in sustaining the revocation of parole (Pet. App. 15a).

In any event, petitioner complains only of a lack of evidence to sustain the unauthorized possession of firearms charge. His parole was revoked as well on the basis of the charge of unauthorized association with known criminals, a charge which was proved by his own admissions both at the hearing (C.A. App. Gov't Exh. R 14) and in state court (*id.* at Gov't Exh. S 3-5). That charge alone is thus sufficient to support the revocation of parole, and it is clear that the district court could not have overturned the revocation even under a preponderance of the evidence standard of review. Cf. *Morrissey* v. *Brewer*, 408 U.S. 471, 490 (1972).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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